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FILED
JUL 6 1972
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

ALFRED FRANKE and THEODORE R. P. MARTIN
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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To the Supreme Court of Missouri

Southwestern Bell Telephone Company, a corporation, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Missouri entered on April 10, 1972, in the cause entitled **Alfred Franke and Theodore R. P. Martin v. Southwestern Bell Telephone Company**, No. 55,533.

OPINIONS BELOW

This cause was tried without a jury in Division I of the Circuit Court of St. Louis County before Honorable George E. Schaaf, Circuit Judge; **Alfred Franke, et al. v. Southwestern Bell Telephone Company**, cause 266,187. Judge Schaaf entered his Findings of Fact, Conclusions of Law and Judgment on January 16, 1970, in which he denied the prayers of Plaintiff and held that Southwestern Bell Telephone Company had a franchise property right under § 392.080, R.S.Mo. 1969, with respect to its utility facilities as situated in the subject real estate. His findings and Conclusions have not been officially reported and have been reproduced and attached hereto as Appendix A.

The decision of the Circuit Court of St. Louis County was appealed to the Supreme Court of Missouri; **Alfred Franke, et al. v. Southwestern Bell Telephone Company** in the Supreme Court of the State of Missouri, Division I, No. 55,533. The Supreme Court of Missouri, Division I, in its opinion filed April 10, 1972, reversed and remanded the decision of the Circuit Court of the County of St. Louis, holding that Southwestern Bell Telephone Company had only a revocable license under its franchise. The Court further held that Southwestern Bell's interest in the subject real estate was terminated by the sale of the highway right-of-way to private parties, and their subsequent notice to Southwestern Bell to vacate said property. The decision of the Supreme Court of Missouri is officially reported at 479 SW2d 472 (Mo. 1972). A copy of the opinion is reproduced and attached hereto as Appendix B.

Petitioner filed its timely Motion for Rehearing or in the Alternative for Transfer to Supreme Court En Banc on April 21, 1972. On May 8, 1972, said Motion for Rehearing or in the Alternative for Transfer was overruled without further opinion by Division I of the Supreme

Court. A copy of the letter of the Clerk of the Supreme Court of Missouri advising of the overruling of Petitioner's Motion is reproduced and attached hereto as Appendix C.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on April 10, 1972. A timely Motion for Rehearing or in the Alternative for Transfer to the Missouri Supreme Court En Banc was filed on April 21, 1972, and was denied without further opinion of the Court on May 8, 1972. This Petition for Writ of Certiorari is filed within ninety (90) days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. The Missouri Supreme Court held that Petitioner's "franchise" rights, acquired by virtue of accepting the legislative grant in Section 392.080 R.S.Mo. 1969, were nothing more than mere revocable licenses. Does this decision by the Missouri Supreme Court impair Petitioner's contractual property rights in violation of Article I, Section 10 of the Constitution of the United States, and take Petitioner's property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States?

2. The Missouri Supreme Court held that despite the fact that the State, in its quitclaim deed conveying excess highway right-of-way, had reserved and acknowledged the right of public utilities to remain in place, the effect of such conveyance was to terminate the rights of utilities located on such excess right-of-way and subject such utilities to ejectment as trespassers by the third party purchasers. Does this holding of the Missouri Supreme

Court take Petitioner's property, acquired by virtue of accepting a legislative grant under the provisions of Section 392.080, R.S.Mo. 1969, acknowledged by the conveyance "subject to utilities in place", without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States?

3. Under §227.240 and Chapter 536 R.S.Mo., Southwestern Bell Telephone Company had the right to remain in peaceful possession of its easements and maintain its facilities, as located, in the subject real estate until the Highway Commission has afforded proper notice and hearing, and presented sufficient evidence to establish that the relocation of Petitioner's utility facilities was reasonably required in connection with highway use, construction or maintenance. The Missouri Supreme Court held that by the mere sale of excess highway right-of-way, the Highway Commission caused the Petitioner to lose its right to peacefully maintain its facilities, as located, on that right-of-way, even though the instrument of conveyance clearly shows that such was not intended by the Highway Commission. Does this holding by the Missouri Supreme Court which allows the Highway Commission to indirectly cause a utility to relocate or completely remove its facilities, without notice or hearing (although the Highway Commission is specifically prohibited from directly doing this by statute) deprive Petitioner of its property and procedural due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Article I, Section 10:

> **Section 10.** No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.
>
> * * * * * * *

Amendment V:

> ARTICLE V
>
> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV, Section 1:

> ARTICLE XIV
>
> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

MISSOURI REVISED STATUTES, 1969

Section 392.080:

392.080. May construct lines on public roads—consent of city required.—Companies organized under the provisions of sections 392.010 to 392.170, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters; provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof.

Section 227.240:

227.240. Location and removal of public utility equipment—penalty for violation.—1. The location and removal of all telephone, telegraph and electric light and power transmission lines, poles, wires, and conduits and all pipelines and tramways, erected or constructed, or hereafter to be erected or constructed by any corporation, association or persons, within the right-of-way of any state highway, insofar as the

public travel and traffic is concerned, and insofar as the same may interfere with the construction or maintenance of any such highway, shall be under the control and supervision of the state highway commission.

2. The commission or some officer selected by the commission shall serve a written notice upon the person or corporation owning or maintaining any such lines, poles, wires, conduits, pipelines, or tramways, which notice shall contain a plan or chart indicating the places on the right-of-way at which such lines, poles, wires, conduits, pipelines or tramways may be maintained. The notice shall also state the time when the work of hard surfacing said roads is proposed to commence, and shall further state that a hearing shall be had upon the proposed plan of location and matters incidental thereto, giving the place and date of such hearing. Immediately after such hearing the said owner shall be given a notice of the findings and orders of the commission and shall be given a reasonable time thereafter to comply therewith; provided, however, that the effect of any change ordered by the commission shall not be to remove all or any part of such lines, poles, wires, conduits, pipelines or tramways from the right-of-way of the highway. The removal of the same shall be made at the cost and expense of the owners thereof unless otherwise provided by said commission, and in the event of the failure of such owners to remove the same at the time so determined they may be removed by the state highway commission, or under its direction, and the cost thereof collected from such owners, and such owners shall not be liable in any way to any person for the placing and maintaining of such lines, poles, wires, conduits, pipelines and tramways at the places prescribed by the commission.

3. The commission is authorized in the name of the state of Missouri, to institute and maintain, through the attorney general, such suits and actions as may be necessary to enforce the provisions of this section. Any corporation, association or the officers or agents of such corporations or associations, or any other person who shall erect or maintain any such lines, poles, wires, conduits, pipelines or tramways, within the right-of-way of such roads which are hard-surfaced, which are not in accordance with such orders of the commission, shall be deemed guilty of a misdemeanor.

Section 227.290:

227.290. Highway commission may convey land or leasehold

Whenever in the opinion of the state highway commission the advantageous use of any interest in land or any leasehold which has heretofore or may hereafter be acquired by the commission has ceased, the state highway commission shall have authority to convey the same for the best available cash price by deed signed by its chairman or vice-chairman and attested by its secretary; provided, however, that before any sale shall be consummated under this section, the grantor to the state of the property offered for sale, if real estate, and if such grantor shall at the time be in possession of the adjoining land, shall be notified by written notice of the state highway department, of such contemplated sale; provided, that all moneys received from the disposal of any such interest in land or leasehold shall be deposited in the state treasury to the credit of the state road fund; provided further, that when any land or leasehold herein described has been donated without charge whatsoever, by the owner and grantor of said property to the purpose of state highway construction or maintenance and such grantor is still in possession of contiguous property, the same shall revert to such

original owner without cost to him if and when relinquished by the state.

Section 536.010 (2):

(2) **"Contested case"** means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.

Section 536.067:

536.067. Notice in contested case—mailing—contents—notice of hearing—time for.—In any contested case:

(1) The agency shall promptly mail a notice of institution of the case to all necessary parties, if any, and to all persons designated by the moving party and to any other persons to whom the agency may determine that notice should be given. The agency or its clerk or secretary shall keep a permanent record of the persons to whom such notice was sent and of the addresses to which sent and the time when sent. Where a contested case would affect the rights, privileges or duties of a large number of persons whose interests are sufficiently similar that they may be considered as a class, notice may in a proper case be given to a reasonable number thereof as representatives of such class. In any case where the name or address of any proper or designated party or person is not known to the agency, and where notice by publication is permitted by law, then notice by publication may be given in accordance with any rule or regulation of the agency or if there is no such rule or regulation, then, in a proper case, the agency may by a special order fix the time and manner of such publication.

(2) The notice of institution of the case to be mailed as provided in this section shall state in substance:

(a) The caption and number of the case.

(b) That a writing seeking relief has been filed in such case, the date it was filed, and the name of the party filing the same.

(c) A brief statement of the matter involved in the case unless a copy of the writing accompanies said notice.

(d) Whether an answer to the writing is required, and if so the date when it must be filed.

(e) That a copy of the writing may be obtained from the agency, giving the address to which application for such a copy may be made. This may be omitted if the notice is accompanied by a copy of such writing.

(3) Unless the notice of hearing hereinafter provided for shall have been included in the notice of institution of the case, the agency shall, as promptly as possible after the time and place of hearing have been determined, mail a notice of hearing to the moving party and to all persons and parties to whom a notice of institution of the case was required to be or was mailed, and also to any other persons who may thereafter have become or have been made parties to the proceeding. The notice of hearing shall state:

(a) The caption and number of the case.

(b) The time and place of hearing.

(4) No hearing in a contested case shall be had, except by consent, until a notice of hearing shall have been given substantially as provided in this section, and such notice shall in every case be given a reasonable time before the hearing. Such reasonable time shall be at least ten days except in cases where the

public morals, health, safety or interest may make a shorter time reasonable; provided that when a longer time than ten days is prescribed by statute, no time shorter than that so prescribed shall be deemed reasonable.

Section 536.070(2):

(2) Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.

and,

Chapter 536, R.S.Mo. 1969, ADMINISTRATIVE PROCEDURE AND REVIEW—generally. (Too lengthy to reproduce as an Appendix.)

STATEMENT OF THE CASE

Petitioner is a telephone company authorized to place its utility facilities on state highway rights-of-way by the terms of Section 392.080, R.S.Mo. 1969, subject only to prior consent of municipal authorities when placed in a city (not in issue in this case), and the limited supervisory powers reserved by the State and administered by the Highway Commission under Section 227.240, R.S.Mo. 1969. The relevant portions of these statutes provide:

392.080. **May construct lines on public roads—consent of cities required**—Companies . . . constructing and maintaining telephone . . . lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as

not to incommode the public in the use of such roads, streets and waters. . . .

227.240. **Location and removal of public utility equipment—penalty for violation**—1. The location and removal of all telephone . . . lines, poles, wires, and conduits . . . within the right-of-way of any state highway, insofar as the public travel and traffic is concerned, and insofar as the same may interfere with the construction or maintenance of any such highway shall be under the control and supervision of the state highway commission.

These reserved powers to protect the public's interest in the use of the right-of-way for highway purposes are the **only applicable statutory restrictions** on Petitioner's use of the public roads, streets and highways.

Prior to 1958, for many years Petitioner, Southwestern Bell Telephone Company, maintained its main trunk cable facilities, serving the Lambert Municipal Airport complex and environs, within the public right-of-way running along and just north of Natural Bridge Road in St. Louis County, Missouri (App. p. A-1). In 1958, in preparation for new highway construction and pursuant to Section 227.240, R.S.Mo., the State Highway Commission ordered the Petitioner to relocate its telephone conduit and facilities (Tr. 132, 133). After proper application for relocation, public notice and public hearing, Southwestern Bell was granted a permit by the Highway Commission of Missouri to relocate its conduit and facilities, to their present position (Tr. 121). The relocation of facilities, which consisted of a buried nine duct tile conduit with supporting cables, laterals, and manholes, was completed in the fall of 1959 (Tr. 131-137, 139-142). In all of the years thereafter, up to and including the date of this writing, neither the State Highway Commission or its engineers have suggested that Petitioner's facilities, as located, in any way

interfere with or incommode the public use of the highway, or that such facilities should be relocated (App. pp. A-2, A-3).

In 1963, the State Highway Commission, under its powers in Section 227.290, R.S.Mo. 1969, advertised an auction of 79 parcels of "excess property." This advertisement included the subject property (Parcel 12), for which Respondents, Franke and Martin were the successful bidders and subsequent purchasers (App. p. A-9).

The subject telephone conduit and facilities lie under Parcel 12 and have been there since 1958, when the State Highway Commission ordered relocation pursuant to Section 227.240, R.S.Mo. Parcel 12 was purchased by Respondents **from the State of Missouri** via a quitclaim deed which expressly contained the reservation "subject to all utilities in place" (App. p. A-2).

No notice was given Petitioner, and no hearing was held with regard to the relocation of Petitioner's facilities. Petitioner was not aware of the purchase of the subject property by Franke and Martin until January, 1965 (App. p. A-3).

The purchasers, Franke and Martin, notified Petitioner to vacate the subject parcel in 1965 (App. p. A-3), which Petitioner refused to do, and an ejectment suit ensued. The cause was heard on November 7, 8, 27, and December 16, 1968, and briefed by both parties.

The Circuit Court of the County of St. Louis, Division 1, found that Petitioner held an irrevocable franchise or property right as to parcel 12 and was, therefore, entitled to continue to maintain its telephone conduit and facilities thereunder (App. pp. A-5, A-6).

Plaintiffs, Franke and Martin, appealed to the Supreme Court of Missouri. The Supreme Court of Missouri, Di-

vision 1, decided that Petitioner's rights under State statute were only in the nature of a license:

> "The answer to question I [I. What right did defendant acquire from the Highway Commission with respect to the consent given it by the Commission to place its conduit and manholes in the highway right-of-way?], then, is that Bell acquired only a license from the Highway Commission to place its conduit and manholes on subject property when it was a part of the right-of-way and then under control and supervision of the Commission (App. p. A-15).

Although Petitioner's brief had clearly raised the issue of its franchise rights as determined by this Court in **Owensboro v. Cumberland Telephone Co.**, 230 U.S. 58, the Missouri Supreme Court held:

> Respondent cites a number of cases . . . **Owensboro v. Cumberland Telephone Co.**, 230 U.S. 58, . . . on its premise that it acquired a "franchise" right, which, upon acceptance by installation of fixtures, became, in some way, irrevocable and not subject to ouster by the Highway Commission. The difficulty with respondent's argument and citations is that they relate only to whether Bell as a utility can be denied or removed from use of highway right-of-way by the highway authority. The cases do hold that the utility may not be so denied by the highway commission; but they have nothing to do with the rights of a private property owner as against a utility that would occupy private property without consent of, or compensation to, the private landowner (App. p. A-16).

The Court then went on to hold:

> ". . . that the consent or license to use the right of way given Bell by the Highway Commission did

not extend beyond the Commission's occupancy of the right of way and could give Bell no right in such land after title passed to plaintiffs. As a consequence, Bell became a trespasser upon plaintiffs' land from the date of plaintiffs' demand for Bell to move or pay" (App. p. A-17).

And, in response to Petitioner's argument that the state [through its agent, Highway Commission of Missouri] reserved or created rights in the Deed of Conveyance in favor of it by transferring the subject parcel "subject to utilities in place", the Court held:

"Since, as previously demonstrated, Bell held no right in subject property beyond its control by the Highway Commission, the emphasized words and the physical presence of manholes, given their fullest import, have no bearing on plaintiffs' rights. The words 'utilities in place' and their visual obviousness, if so, did not breath more life into the license than it had at the time the land on which it was exercised was conveyed. As previously recognized, the Highway Commission, by its quitclaim deed, relinquish all its right, title and interest in subject property, including its authority to license or permit Bell to use subject land when it was highway right of way as opposed to private property. In short, plaintiffs are not subject to an estoppel by a nonexistent right" (App. p. A-17).

Petitioner was held to be a trespasser, and the cause was reversed and remanded to the Circuit Court of St. Louis County. (The complete text of the Opinion is reproduced as Appendix B).

Petitioner filed a timely motion for rehearing, or in the alternative, for transfer to the Supreme Court en banc in which it specifically raised the Federal questions of impairment of contract and deprivation of property

without substantive and procedural due process of law. The Supreme Court of Missouri, Division 1, overruled Petitioner's Motion for Rehearing and Alternative Motion to Transfer to the Court En Banc without rendering an opinion; **Franke, et al. v. Southwestern Bell Telephone Co.**, No. 55,533, May 8, 1972, reported at 479 SW2d 472.

All Federal questions presented herein by the Petitioner were timely raised in the Court below and were disposed of by that Court in such a manner as to place them within the scope of review established by this Court.

Petitioner's federally protected contractual property rights were asserted at the trial level, and the substantive due process argument was raised in the Defendant's Brief to the trial court by Petitioner's reference to the ruling of the Supreme Court of the United States in **Owensboro v. Cumberland Tel. & Tel.**, 230 U.S. 58, 57 L. Ed. 1389, l.c. 1396. The Circuit Court of the County of St. Louis did not specifically refer to **Owensboro**, supra, or the Federal issues raised by that case in its opinion.

The Federal questions raised in petitioner's trial brief by its reference to **Owensboro**, supra, were again raised and were amplified in the Statement, Brief and Argument of Southwestern Bell Telephone Company which was submitted to the Supreme Court of Missouri. (The applicable pages of that brief, pp. 16-22, have been reproduced and attached hereto as appendix D).

Petitioner again raised the constitutional issues referred to in **Owensboro**, supra, in its Motion and in its Suggestions in Support of its Motion for Rehearing and Alternative Motion for Transfer to the Supreme Court En Banc (Reproduced and Attached as Appendices E and F) (App. p. 40), Petitioner asserted that:

> The holding and opinion of this court [the Supreme Court of Missouri] is contrary to, and thus ignores,

> decisions of the Supreme Court of the United States and of this court en banc, deprives respondent of its property without due process of law, and is in violation of the constitutions of the United States and of the State of Missouri, in its finding that respondent had only a bare license to maintain its underground utility facilities where placed and in use for Fourteen (14) years, and in failing to recognize that respondent had a vested real property interest in the nature of an easement, or, at the very minimum, a non-revocable license coupled with an interest. These raise Federal questions which require a transfer to the court en banc, pursuant to Article V, § 9, of the Constitution of Missouri (App. p. A-31).
>
> If Respondent [Petitioner here] does not have a real property interest in the nature of an easement which is protected upon the sale of excess property by the State (through the Highway Commission), then the sale itself was invalid because the purported sale of this excess property has effectively removed Respondent's facilities from the State Highway right-of-way without notice to Respondent and without giving Respondent an opportunity to be heard as required by said Chapters 227 and 536, R.S.Mo. 1969. The result of this Court's interpretation is to place the State and Highway Commission in the position of having deprived Respondent of its due process of law in violation of specific statutory prohibitions. . . . (App. p. A-32).

The issue of deprivation of petitioner's property without procedural due process as raised in Petitioner's Motions for reconsideration, did not exist and was not ripe for litigation until the Supreme Court of Missouri rendered its decision.

This Court has held that it will entertain a Federal question raised initially on a motion for reconsideration

when such question could not have been anticipated or raised earlier. **Missouri ex rel. Missouri Ins. Co. v. Gehner**, 74 L.Ed. 870 (1930); **Saunders v. Shaw**, 244 U.S. 317 (1919); **Great Northern R. Co. v. Sunburst Oil & Ref. Co.**, 387 U.S. 358 (1932).

Mr. Justice Holmes, in **Saunders v. Shaw**, 244 U.S. 317 (1917) observed that:

> When the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the Plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for the infraction of constitutional rights if the party aggrieved could not come [to the Supreme Court of the United States] . . . .

Such an unexpected act by a state Supreme Court was found in **Great Northern R. Co. v. Sunburst Oil and Ref. Co.**, 387 U.S. 358 (1932). In that case, the Supreme Court of Montana construed a statute so as to empower the Montana Board of Railroad Commissioners to fix retroactive rates, whereas prior to that time, no such retroactive rates had been allowed. Mr. Justice Cardozo, decided that the Petitioner could not have challenged the validity of the ruling whereby the statute was "adjudged to mean one thing for some cases and another thing for others" prior to the motion for reconsideration, and on the basis of that decision, exercised jurisdiction.

The **Great Northern** case, supra, is quite similar to the instant case. It has been held, in Missouri, that the Highway Commission has no right under § 227.240 "to exclude [utilities] from the right-of-way." **State ex rel. State Highway Commission v. Union Electric Co. of Missouri**, Mo. App., 142 SW2d 1099, 1101 (1940); also followed in **State ex rel. State Highway Commission v. Weinstein**, at 322 SW2d 782, 783 (1959). On the basis of these prior

opinions, Southwestern Bell had every reason to rely on its rights as being more than a mere license, revocable "at will". Petitioner should not be bound to have anticipated that the Missouri Supreme Court would disregard the positions it adopted in **Union Electric** and **Weinstein**, supra. Therefore, the Federal question pertaining to deprivation of property without procedural due process which was specifically raised in the Motion for Rehearing and Motion for Transfer to the Supreme Court en banc was timely raised and should be considered by this Court.

REASONS FOR GRANTING THIS WRIT

There are no adequate state grounds upon which the Supreme Court of Missouri may have rendered its decision in the instant case without deciding the federal questions herein discussed.

In deciding the instant case, the Supreme Court of the State of Missouri has either "decided . . . federal question[s] of substance not [heretofore] . . . determined by this court, or [it] has decided [federal questions] . . . in a way probably not in accord with applicable decisions of this court." (U. S. Sup. Ct. Rule 19, 28 U.S.C.)

1. The Supreme Court of Missouri has misinterpreted and attempted to distinguish a decision of the United States Supreme Court, in particular the doctrine of vested franchise property right as set out in **Owensboro v. Cumberland Tel. & Tel.**, 230 U.S. 58, 57 L.Ed. 1389. The Missouri Supreme Court has thus directly controverted decisions of this Court, has impaired Petitioner's contractual property rights and has deprived Petitioner of its property without due process of law.

The Missouri Supreme Court, while acknowledging Petitioner's right to use highway right-of-way under

§ 392.080, R.S.Mo. 1969, has misinterpreted **Owensboro**, supra, by finding that the legislative grant under § 392.080 was merely a revocable license from the Highway Commission:

> "Since Bell had only a license from the Highway Commission to use land under control of the Commission, it follows that Bell could have no right by virtue of such license after the Commission's relinquishment and deed of its right, title, and interest (and control) to plaintiffs" (App. p. A-15).

Such holding is directly contrary to this Court's decision in the **Owensboro** case (230 U.S., l.c. 64, 65):

> 1. **That the right conferred by the ordinances involved is something more than a mere license is plain.** A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and recovable at the will of the latter unless . . . expenditures contemplated by the licensor when the license was given have been made . . .
>
> That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal nor for a temporary purpose. The right conferred came from the state through delegated power to the city. The grantee was clothed with the fanchise to be a corporation and to conduct a public business which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law, and it was subject to all of the police power of the city.
>
> **That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases. . . .**

2. The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, **is a grant of a property right in perpetuity**, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant.

* * * * * * *

If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. **If the grant be accepted** and the contemplated expenditure made, **the right cannot be destroyed** by legislative enactment, or city ordinance based upon legislative power, **without violating the prohibitions placed in the Constitution for the protection of property rights.**

When discussing the City of Owensboro's attempt to revoke defendant telephone company's franchise right to remain and operate within the city streets the Court held (230 U. S., l. c. 72):

It (city ordinance requiring defendant to remove its facilities from city streets and alleys) is a plain attempt to destroy the **vested property right** under which a great plant had been installed. . . . **When that grant was accepted and acted upon it became a contract between the city and the telephone company which could not be revoked or repealed unless the**

> **power to revoke or repeal was clearly and unmistakably reserved** (emphasis added).

That decision was not limited to the particular ordinance brought into question in that individual case, but is extended to all such legislative acts.

There is no valid basis for distinguishing the **Owensboro** case from the case at issue. The only reserved powers under § 392.080 and § 227.240 involve those concerning use, construction, and maintenance of the highway; these reserve powers were not at issue in the instant case.

Certainly, if the legislature intended that the placement of costly and permanent utility facilities on public right-of-way is a valid public purpose at the time of installation, it is inconsistent with that intent to argue that the public interest would be best served by subsequently limiting those rights and transforming them into revocable licenses. Absent specific statutory authority, the rights granted and protected by the Legislative Act, however named and described, may not be summarily destroyed by a private individual; or, for that matter, by a state agency such as the Highway Commission since no such power has been reserved or given to it as is evidenced by the specific limitations set out in § 227.240, R. S. Mo. The clear legislative intent is that defendant acquires a real property interest in those locations where it accepts the franchise grant and the property has been properly developed for a public purpose, as in the instant case.

The statutory franchise, when accepted by the installation and use of permanent and extensive facilities creates a real property right and interest in the common sense of the word. Whether Southwestern Bell's property right is termed a "limited easement", a "franchise right" or "a license coupled with an interest" is a matter of semantics —the intent of the legislature was the same by whatever

name it is called, and the courts have interpreted each to be an irrevocable real property interest when coupled with (1) justifiable reliance upon the right of use by the utility, (2) acceptance and substantial expenditures of either time or money on permanent improvements which are for (3) contemplated or actual public use. In the instant case all three requirements have been met by Southwestern Bell.

The distinction made by the Supreme Court of Missouri of **Owensboro**, supra, from the instant case was a distinction without a difference. Petitioner obtained a property right in perpetuity in the land in question when it belonged to the State and was a part of the highway right-of-way. Once Petitioner had acquired such property right in perpetuity, it clearly runs with the land.

The Supreme Court of Missouri, however, improperly construed a statute so as to destroy the property right which Petitioner has in the land in question. Such a construction of the statute involved (§ 227.240, R.S.Mo. 1969) is contrary to and in violation of Article I, Section 10, clause 1 and the due process clauses of the V and XIV Amendments of the Constitution of the United States.

The decision of the Missouri Supreme Court directly contravenes the holdings of this Court in **Owensboro**, supra, and the numerous cases cited therein. (**Detroit v. Detroit Citizen's Street R. Co.**, 189 U.S. 368, 395, 46 L.Ed. 592, 610, 22 Sup. Ct. Rep. 410; **Louisville v. Cumberland Teleph. & Teleg. Co.**, 224 U.S. 649, 661, 56 L.Ed. 934, 939, 32 Sup. Ct. Rep. 572; and **Boise Artesian Hot & Cold Water Co. v. Boise City**, 230 U.S. 84, 33 Sup. Ct. Rep. 997.

2. If the Missouri Supreme Court did not directly contravene the cited decisions of this Court, then the Missouri Supreme Court, in the instant case, has affirmatively decided a Federal question not heretofore determined by this Court; namely, may a state highway commission,

without violating the due process clause of the Fourteenth Amendment and the due process and just compensation clauses of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, **indirectly** terminate a private property right granted a public utility by the legislature, under which said utility has placed its facilities in highway right-of-way, by selling such right-of-way to private persons where said commission is specifically prohibited by statute from terminating such right?

The Supreme Court of the State of Missouri refused to reconsider this Federal question when it overruled Petitioner's motions for rehearing and transfer to the Court en Banc. In so doing, the Missouri Supreme Court unlawfully delegated to the Highway Commission authority in excess of and contrary to that granted it by statute, and contrary to the Missouri Revised Statute. The statutory authority of the Highway Commission to control and supervise the location of utility facilities within public right-of-way is set out in § 227.240, R.S.Mo. 1969. That authority may only be exercised insofar as necessary to protect public travel and traffic or to prevent interference with highway construction or maintenance. The Commission could not convey that authority to plaintiffs.

Further, the Commission itself does not have authority under the statute to require defendant to **remove** all or any part of its facilities from the right-of-way for the statute plainly states:

> ". . . provided, however, that the effect of any change ordered by the commission shall not be to remove all or any part of such lines, poles, wires, conduits, pipelines or tramways from the right-of-way of the highway." R.S.Mo., § 227.240.

The Supreme Court of Missouri recognizes this limitation on the Commission, but ignores the incongruity of allow-

ing ouster and removal indirectly by the third party purchaser:

> The difficulty with respondent's argument and citations is that they relate only to whether Bell as a utility can be denied or removed from use of highway right of way by the highway authority. The cases do hold that the utility may not be so denied by the highway commission; but they have nothing to do with the rights of a private property owner as against a utility that would occupy private property without consent of, or compensation to, the private landowner (App. p. A-16).
>
> • • • • • • •
>
> . . . the consent or license to use the right of way given Bell by the Highway Commission did not extend beyond the Commission's occupancy of the right of way and could give Bell no right in such land after title passed to plaintiffs. As a consequence, Bell became a trespasser upon plaintiffs' land from the date of plaintiffs' demand for Bell to move or pay (App. pp. A-16, A-17).

Furthermore, the Court completely ignored the fact that the State fully recognized the petitioner's right to maintain its facilities so located on the property in question when the State (acting through its agent, the Highway Commission of Missouri under § 227.290, R.S.Mo. 1969) conveyed such property to the purchasers "subject to utilities in place."

Clearly, title to the property in question was taken by the State; and, therefore, conveyed by the State. The State through the General Assembly had granted a franchise right to the Respondent under § 392.080; it recognized that right, the legislative intent and the public purpose of the grant, and its obligation under statute to protect the public and Respondent's interest. By specific reservation in the deed of conveyance, the State of Mis-

souri made the transfer "subject to utilities in place". By including that language the State acknowledged and sought to insure the preservation of the property rights granted the petitioner by the statute.

The Court's decision clearly interprets the Petitioner's protected rights under §§ 392.080 and 227.240 R.S.Mo. 1969 in such a manner as to deprive Southwestern Bell of its property without due process of law.

3. Petitioner was denied its property without procedural due process of law by the Missouri Supreme Court's decision that the mere sale of the property by the Highway Commission under § 227.290 R.S.Mo. extinguished petitioner's property interest and right to remain in peaceful possession of its property **without notice or hearing** as required by both § 227.240 and Chapter 536, R.S.Mo. 1969, and Amendments Five and Fourteen to the United States Constitution.

Under the provisions of § 227.240, R.S.Mo. 1969, as recognized by the Missouri Supreme Court in its opinion and holding, as well as in the cases cited by it, the State Highway Commission could not have ordered Respondent to completely remove its facilities from state highway right-of-way. Such was that Court's specific holding in **State ex rel. State Highway Commission v. Weinstein,** 322 SW2d 778 (Mo. 1959). The Highway Commission could not have ordered relocation of those facilities within the right-of-way (even for a valid public purpose) without proper written notice and hearing as required by the provisions of Chapter 536 RSMo. 1969, the Administrative Procedure and Review Act, **Weinstein,** supra.

The Missouri Supreme Court refused to consider this Federal question which was specifically raised in Petitioner's Motion for Rehearing and Alternative Motion for Transfer to the Supreme Court en Banc (App. p. A-31, A-32).

4. The magnitude of the public interests involved and the wrong which has been done Petitioner's constitutional rights place this case in that class of cases which present special and important issues of such proportions as to demand consideration by the Supreme Court of the United States.

The holding and opinion of the Court affects not only Petitioner. It seriously impairs the right of public utilities throughout Missouri to locate and maintain their facilities in public road right-of-way, by transforming the franchise rights, granted the utilities by the Legislature, into bare licenses. These public utilities, operating for years under their respective franchises, have invested billions of dollars in the facilities used to serve the people of Missouri, with a large part of these facilities located on public road right-of-way. The decisions to so invest in facilities located on public road right-of-way were made with the assurance of the Legislature that the utilities had a legally protected franchise right of uninterrupted use of the facilities as placed, subject only to the superior right of the State to require relocation to another site within the right-of-way when specific public interests required the relocation, and even then, the public utility was entitled to notice, hearing and judicial review as to whether that **public** interest required the relocation. The holding and decision of the Missouri Supreme Court in this case seriously impairs these franchise rights, discourages the use of public right-of-way by these public utilities, and requires these public utilities to acquire private right-of-way to insure that they may continue to use the facilities as and where they are constructed. This becomes a matter of great public interest and importance because the substantial additional expenditures required will become a part of the utilities' investment upon which the rates paid by the people in Missouri are based. In addition, the holding and opinion of the Court will result

in a proliferation of legal proceedings and condemnation actions required to secure necessary and protected utility right-of-way, and will burden real properties in Missouri with numerous additional servitudes and encumbrances.

The opinion and holding of the Court subjects every utility in the State of Missouri to the constant peril and even caprice of the Highway Commission. If by that decision the Highway Commission may, as here, order a relocation of the facilities of public utility companies at unusual expense, and then, by sale of a portion of the highway, either intentionally or unintentionally void all rights of utilities located on that property, that decision will create state-wide confusion applicable to all utilities and will constitute an unbelievable inequity in that literally thousands of situations such as this will arise or indeed potentially exist at this moment.

The opinion and holding of the Missouri Supreme Court would further effectively subvert the intent of this Court in **Owensboro**, supra, and prevent the orderly provision of public utility easements without cost to the public (rate payers).

Clearly, under the terms expressed by the Supreme Court of the United States in **Owensboro**, supra, Petitioner, as a utility company, has a property right in the land in question. Moreover, "[a]s a property right it [is] . . . assignable, taxable, and alienable. Generally [such property rights are assets . . .] of great value to such utility companies, and [are] a principal basis for credit."

Hence, the decision of the Missouri Supreme Court in the instant case will not only burden Petitioner, but it will also impose a weighty burden upon the public and upon public utility companies as a group. The magnitude of the public interests involved and the wrong which has been done Petitioner's constitutional rights place

this case in that class of cases which present special and important issues of such proportions as to demand consideration by the Supreme Court of the United States.

It appears to be necessary that this Court either uphold or clarify, or overrule the decisions which it rendered in its prior cases. This Court should not acquiesce to changes in the construction of the Constitution of the United States by the Courts of individual states. Constitutional rights and prohibitions should apply equally throughout the United States.

The decision of the Missouri Supreme Court exposes the "assignable, taxable and alienable" property rights of all utilities who choose and who have chosen to accept the franchise granted by the state legislatures to termination by judicial pronouncement.

This Court should clarify and uphold its decisions in **Owensboro**, supra, and protect the property of Petitioner from unconstitutional infringement.

CONCLUSION

For the foregoing reasons Petitioner respectfully states that a Writ of Certiorari should issue to review the judgment and opinion of the Missouri Supreme Court.

Respectfully submitted

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APPENDIX A

State of Missouri
County of St. Louis } ss.

In the Circuit Court of the County of St. Louis
State of Missouri

Alfred Franke, et al
Plaintiffs
vs.
Southwestern Bell Telephone Company, a corporation
Defendant.

Cause No. 266187
Division No. 1

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

At Clayton, St. Louis County, Missouri, this 16th day of January, 1970.

This cause having come on for trial with testimony taken on November 7, 8, and 27, 1968, and December 16, 1968, and thereafter briefs being submitted by the parties, the first of which being received by the Court on February 24, 1969 and the last of which submissions to the Court by counsel being August 14, 1969; and with all parties having been afforded ample opportunity to present their positions and the law appertaining thereto; and this Court having been fully advised in the premises, does find:

Findings of Fact

Prior to 1958, for many years the defendant Southwestern Bell Telephone Company maintained its main trunk cable facilities, serving the Lambert Municipal Air-

port complex and environs, within the Public Right of Way running along and just north of Natural Bridge Road in St. Louis County, Missouri.

During the summer of 1958, the State Highway Commission of Missouri notified the defendant (as well as the gas and water utilities) that their facilities would have to be relocated to accommodate the construction of the Mark Twain Highway, all in keeping within the supervisory powers of said State Highway Commission under R.S.Mo. 1959, Section 227.240.

Provision was made by the State Highway Commission for the placement of the facilities of the three (3) utilities along the southern outer roadway of the proposed Mark Twain Expressway, and all of said utilities including this defendant, proceeded with such relocation, under which program all facilities were placed underground. The work was supervised by both the utility companies' engineers and the State Highway's resident engineer, Karsch.

Stipulated Exhibit A reflected that defendant made application for permit on August 18, 1958, and after due publication in the St. Louis Countian on August 21, 22, 23 and 27, 1958, a permit was duly issued on September 4, 1958.

Defendant's Exhibit 11 reflects that on the "Final Plans" of the State Highway Commission that the defendant's conduit, the 20 inch water main and the 8 inch gas main were all three depicted as being situated on the subject property or along and adjacent to same. The State Highway Commission's file reflects a letter (from its district engineer to defendant) of August 26, 1958, announcing that defendant's conduit "will vary from 25 to 45 feet from the edge of the pavement of the outer roadway."

In all of the years between 1958 and thereafter, up to and including the date of this writing, there has been no

complaint or suggested relocation from the State Highway Commission or its engineers directed to this defendant.

In the late summer of 1963, the State Highway Commission, under its powers R.S. Mo. 1959, Section 227.090, advertised an auction of 79 parcels of "excess property" (Exhibit E under Stipulation). This advertisement included Parcel 12 (the subject parcel involved in this lawsuit), on which the plaintiffs were the successful bidders of a strip of ground approximately 330 feet long by 85 feet deep, situated along the outer roadway between Whitfield Lane on the west and Herklotz Private Drive on the east. This strip comprised but a small segment of the overall relocation of the three utilities between Edmundson and Woodson Roads in St. Louis County, Missouri.

Exhibit E under Stipulation clearly specified that "Title conveyed by quit-claim deed. All sales as is, where is." Plaintiffs testified they saw the subject parcel for the first time on the date of the auction; i.e. September 10, 1963. They testified they did not see the two large 27 inch manhole lids of defendant clearly marked "S. W. Bell System" (see Exhibits 4-9).

Plaintiffs testified they did not see the quit-claim deed which the State tendered on April 9, 1964 (Stipulated Exhibit D) when it was delivered to the title company at their direction. Plaintiffs state they did not know said quit-claim deed expressly contained the reservation "subject to all utilities in place."

Defendant was made aware of plaintiffs' complaint over the location of the telephone conduit in January 1965.

The Issues

Plaintiffs contend that defendant has only a revocable license and should upon notice be obliged to move its facilities from the premises in question, or in the alternative,

condemn such rights as defendant may need to maintain said conduit on said premises.

Conversely, defendant contends it has an irrevocable property (franchise) interest, which was subject only to the supervisory powers accorded the State Highway Commission under very limited circumstances as spelled out by statute. But in no event could defendant be completely deprived of rights accorded it under the legislative grant (franchise) R.S. Mo. 1959, Section 392.080; and it was entitled to be located on the State Highway right of way as directed, and as a minimum "**somewhere.**"

Further, that plaintiffs knew, or should have known, that they bought "subject to all utilities in place" as well as those of record, for their quit-claim deed so clearly pronounced these reservations.

Further, defendant contends that plaintiffs have been guilty of what the Courts describe as "negligent ignorance," on which they cannot rely as a foundation for suit against this defendant.

The further issue was raised by defendant as to whether plaintiffs knowing they were getting only a quit-claim deed, on an "as is, where is" basis, were not duty bound to:

a) Inspect the premises prior to bidding on September 10, 1963;

b) At least inspect the premises prior to April 9, 1964 when the quit-claim was tendered;

c) Inspect the Final Plans of the State Highway Department which revealed that three sets of utilities were situated along the highway on State Right of Way in the area in question;

d) And particularly the plaintiffs ignored the alert in the quit-claim deed: "Subject to utilities in place."

e) That plaintiffs' alleged ignorance cannot be excused by merely contending they had directed the quit-claim deed to be delivered to a title company of plaintiffs' selection.

Conclusions of Law

1) The Court finds that once the defendant had complied with the State Highway Commission's request to relocate the telephone facilities within the right of way of the highway in 1958, that such relocation could not be disturbed (even by the State) except as such location "may affect the construction, maintenance, and ordinary use of the highway," but that even the Highway Commission had no right of relocation "if perchance it merely seemed expedient to the Commission."

That hence the State Highway Commission had no power to delegate to the plaintiffs a right of revocation of defendant's easement, particularly when the State expressly reserved the right to defendant in its quit-claim conveyance to plaintiffs as being:

"SUBJECT TO ALL UTILITIES NOW IN PLACE"

See **State ex rel. State Highway Commission v. Weinstein**, 322 S.W. 2d 778, l.c. 782:

> "1) Although the Commission is given authority to designate the location of pipe lines and to require relocation, it has no right to exclude them from the right of way. State ex rel. State Highway Commission v. Union Electric Co. of Missouri, Mo. App., 142 S.W. 2d 1099, 1101. In that case, it was said, the effect of this statute 'is to place the matter of the location of the lines and appurtenances of public utilities under the control and supervision of the commission, **not, however, for any and all manner of regulation which may perchance seem expedient**

to the commission, but only in so far as the location of such lines and appurtenances may affect the construction, maintenance, and ordinary use of the highways'; and that 'the only orders which the commission may lawfully enter under Section 8109 (now Sec. 227.240) are those which are designed to prevent interference with traffic on the highways and with highway construction and maintenance.' See also State ex rel. State Highway Commission v. Kansas City Power & Light Co., 232 Mo.App. 308, 105 S.W. 2d 1085; and Sec. 393.010."

2) The Court further finds that the quit-claim deed which conditioned plaintiffs' rights to "subject to all utilities now in place," was sufficient (as stated in **McAboy et al. v. Packer**, 187 S.W. 2d 207, l.c. 209) to "excite suspicion and put grantees on inquiry." And that the Final Plans of the State Highway Department (Defendant's Exhibit 11) would have, if examined, reflected that not only did the defendant have a telephone conduit on and along the subject parcel, but also there were depicted a 20 inch water main and an 8 inch gas main situated on the Highway Right of Way, out of which right of way the subject parcel was declared to be "excess" and for sale.

3) The Court rejects the position advanced by plaintiffs that defendant's rights amounted to nothing more than a revocable easement, which would terminate upon notification by plaintiffs to defendant to remove its conduits and facilities, and the Court also rejects that defendant must either purchase or condemn the same or new easement rights.

4) This Court further concludes that a purchaser of land, once he has waived any claim against his vendor, as here, is without right to complain of utilities in place at the time he acquired the tract.

As stated in **Langenberg v. City of St. Louis**, 197 S.W. 2d 621, Sup.Ct. 1946, l.c. 625:

> "* * * Or if 'perchance,' as plaintiff has suggested, **defendant City's original entry upon the described lands was wrongful, nevertheless, since the entry must have been made and permanent improvements constructed for a contemplated public use, a claim or cause of action accrued to the then owner for all damages, present and prospective, occasioned by the wrongful appropriation, quite as though defendant City had proceeded in condemnation. The damage being entire upon the wrongful appropriation, the claim was not transmitted to plaintiff, a subsequent grantee.**"

Judgment

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the prayers of plaintiffs be denied, both as to any claim for actual and/or punitive damages. It is further adjudged and decreed that the defendant, Southwestern Bell Telephone Company, has a franchise or property right with respect to its facilities and conduit as situated in the subject parcel, which right was subject only to the limited supervisory powers accorded the State Highway Commission under the laws of Missouri.

/s/ GEORGE E. SCHAAF
GEORGE E. SCHAAF, Circuit Judge

APPENDIX B

Opinion

(Filed April 10, 1972)

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

Alfred Franke and Theodore R. P. Martin,
Appellants,
vs.
Southwestern Bell Telephone Company,
Respondent.
No. 55,533.

Appeal from the Circuit Court of St. Louis County
The Honorable George E. Schaaf, Judge

Action by plaintiffs for $50,000 actual and $100,000 punitive damages for trespass to real estate, alleged to have occurred through use and occupancy of plaintiffs' land by defendant in maintaining an underground concrete conduit containing wires and cables through plaintiffs' land. Defendant denied the trespass and damages, claimed an easement across plaintiffs' land for purpose of maintaining its conduit, and prayed the dismissal of plaintiffs' action. Jury-waived trial resulted in a judgment which denied plaintiffs' claims for damages and granted defendant "a franchise or property right with respect to its facilities and conduit as situated in the subject parcel, which right was subject only to the limited supervisory powers accorded the State Highway Commission under the laws of Missouri." (Section 227.240, V.A.M.S.)

Appellants contend the court erred in its judgment because defendant had only a license under Section 227.240; that such license could not ripen into the "franchise or property right" awarded defendant; that upon failure of defendant to move from plaintiffs' land upon revocation of the license by plaintiffs, defendant became a trespasser and, accordingly, the court should have assessed damages to plaintiffs for the trespass and taking of the "property right" across plaintiffs' land.

Respondent supports the court's judgment contending that its right to maintain its conduit across plaintiffs' land was superior to plaintiffs' title to the land; that the court properly recognized that defendant had a statutory easement across plaintiffs' property which could not be revoked by plaintiffs; and, further, that plaintiffs are barred and estopped by their failure to inform themselves at the time of their purchase of the land in question about "utilities now in place" as recited in the quitclaim deed by which plaintiffs acquired their title.

Subject land is a tract of 330 front feet, 369 rear feet, and depths of 84 feet on the west and 93 feet on the east, at the intersection of Natural Bridge Road and Whitfield Lane, south of Interstate 70, immediately west of Hilton Inn and east of Lambert St. Louis Airport in St. Louis County, Missouri. Plaintiffs, as highest bidders at auction, purchased the tract from the Missouri Highway Commission at an excess property sale September 10, 1963. The sale was conducted pursuant to Section 227.290, V.A.M.S., which authorizes the Commission, whenever in its opinion the advantageous use of any interest in any land acquired by it has ceased, to convey the same by deed for the best available cash price. The auction sale notice described the subject tract along with 78 other tracts, and stated terms and conditions, including method of payment, necessity of approval of sale by the Commis-

sion, conveyance by quitclaim deed, and all sales "as is, where is."

Plaintiffs examined the property on the date of sale and found it covered with weeds up to three feet in height with a drainage ditch on the rear. They did not see Southwestern Bell manholes on the land. Immediately prior to the sale, representatives of the Highway Commission exhibited a plat of the tract made from plans kept by the Commission. The plat, examined by plaintiffs, did not show any underground conduit through the tract, and no mention was made of any such encumbrance when the auction commenced.

Plaintiffs were the successful bidders for the tract, paid the down payment of 10 per cent of the purchase price, and ultimately paid the total price of $32,428.59.

Immediately following their purchase of the tract, plaintiffs ordered a survey to determine limits of the land and existence and location of easements, if any. The survey showed an easement in Union Electric Company which was later determined to have been abandoned and its release of record was procured.

Plaintiffs' next step in perfection of their title was to order a title certificate and insurance policy from Security Title Company. They also arranged to close the deal by depositing the balance of the purchase price with Security Title with instructions to pay it over to the Highway Commission when the quitclaim deed was tendered and Security was prepared to issue a title policy showing the land free and clear of all encumbrances, particularly as to easements. Unless the title was so certified, plaintiffs were prepared to forfeit their 10 per cent down payment and not close the sale. Plaintiffs received Security's commitment to insure and a title insurance policy in Kansas City Title Company issued by Security as agent. Neither

document showed any encumbrance by way of easements, or for telephone conduit across the tract.

Accordingly, the sale was closed and Security transmitted the Commission's quitclaim deed of April 9, 1964, to plaintiffs' straw party, Maxine Gay. The straw subsequently conveyed the land to plaintiffs by deed of December 30, 1964, recorded January 14, 1965. The Commission's deed contained a recital, "Subject to existing utility easements of record, if any. Also subject to utilities now in place."

On January 14, 1965, plaintiffs were called by their contractor who advised that in the course of an excavation on the land a telephone conduit had been uncovered. Plaintiffs went to Bell's office to inquire about the conduit and were advised that Bell claimed an easement for the conduit. Plaintiffs requested they be shown a copy of the easement but none was produced. A subsequent similar request by plaintiffs' counsel also was refused. Bell further refused to discuss the matter and claimed an absolute right to be on plaintiffs' property. No evidence of Bell's claim was produced, and plaintiffs proceeded with this action.

Prior to 1958, Bell had used and maintained telephone cables and appurtenances within the north side of the right of way of Natural Bridge Road. When plans were developed for construction of Mark Twain Expressway (Interstate 70), the Highway Commission determined that Bell's facilities should be moved and relocated in the south side of the right of way. Accordingly, in the summer of 1958 the Commission, pursuant to Section 227.240, V.A.M.S., ordered Bell to move its facilities to the south side of the highway right of way. Pursuant to such order, Bell filed "Application to Locate Facilities Within the State Highway." After the required public notice and hearing, the Commission, by letter of September 5,

1958, granted Bell "permission" to construct proposed conduit and manholes along designated portions of the right of way; and by letter of September 9, 1958, the Commission transmitted its formal "permit" for construction of underground conduit and manholes "On South side of Outer Roadway from Woodson Road (Route EE) West to Edmundson Road, then North across FAI-1 [the highway] to existing facilities * * *." The permit was further subject to Bell's agreement to promptly move, at applicant's expense, "such part or all of said facility as the Commission may order, to such new location in the right-of-way as the Commission may designate, it being understood and agreed that the location of state highway right-of-way and of all facilities, as well as all highway construction and maintenance within the right-of-way, are always subject to change and orders by the Commission."

Bell installed the conduit and manholes in question in the fall of 1958, and, in agreement with Commission's district engineer, installed the facilities in a manner to accommodate a 20-inch water main and an 8-inch gas main, neither of which is in issue in this action. The installation, in traversing its permitted route, crossed the land comprising the tract purchased by plaintiffs which was part of the right of way prior to the auction sale. The installation consisted of a 9-duct tile conduit with supporting cables and laterals, buried five to six feet, and manholes. The latter were covered by 27-inch manhole lids marked "Bell System," two of which were in subject tract. The conduit divides the property on a straight line about 25 feet from the front or north line until it reaches the eastern manhole where it angles northeast until it leaves subject tract. The eastern portion of the tract was thus more open and a car rental agency was built on the eastern one third of the tract without being affected by the conduit.

Plaintiffs adduced evidence of damages consisting of $250 per month since January, 1965, for trespass and loss of use of the western part of the tract, and damages for inverse condemnation averaging $37,500, and ranging from $25,000 to $75,000 depending upon the use that could be made of the land with the conduit running through it. Defendant's evidence on damages ranged between $12,000 and $17,000, based upon the difference between per square foot valuations as chosen by its appraisers.

Resolution of this appeal requires a determination of two principal questions: I. What right did defendant acquire from the Highway Commission with respect to the consent given it by the Commission to place its conduit and manholes in the highway right of way? II. What right, if any, could defendant thereafter hold or assert against plaintiffs, when the Highway Commission sold to plaintiffs as excess property that portion of its right of way in which defendant had placed its conduit and manholes pursuant to consent given under Section 227.240?

The thrust of appellants' argument on these questions is that Bell acquired only a license for placement of its conduit in the highway right of way, and that such license could not extend any rights in subject property to the licensee beyond the licensor's control of the property.

The respondent argues that plaintiffs by the quitclaim deed acquired only such rights, title, and interests as the Commission had, subject to the restriction and reservations in the deed; and that the Commission had no power to extinguish defendant's right to maintain its conduit and manholes because "defendant's right was and is an irrevocable * * * interest" flowing from its "franchise" right under Section 392.080, V.A.M.S.

Under Section 392.080 Bell is "authorized," as are all telephone and telegraph companies, to set utility fixtures

"along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters; provided * * * they shall first obtain consent" from the proper officials. When such a company wishes to locate its fixtures in a highway under the jurisdiction of the State Highway Commission, such consent must be obtained from the Highway Commission pursuant to Section 227.240, which provides that the location and removal of all such fixtures "erected or constructed, or hereafter to be erected or constructed * * * within the right of way of any state highway, * * * shall be under the control and supervision of the state highway commission."

Neither of these sections accords Bell any right to use and occupy private property without consent of the owner unless it resorts to condemnation proceedings authorized for that purpose by Chapter 523, V.A.M.S. Nor can Sections 392.080 and 227.240 serve as the source of an "easement." Authority acquired by Bell under Sections 392.080 and 227.240, with respect to use of a highway right of way, has been defined previously: "* * * the effect of authorizing a particular location is to give the company what amounts to a license to use that location for its * * * line; and that to order a relocation is in effect the revocation or at least modification of that license. * * * such a license or permission to use a particular location on the right of way is a privilege and not a right, even under the provisions of Sec. 227.240." State ex rel. Highway Comm. v. Weinstein, Mo., 322 S.W. 2d 778-783 [2-4]; State ex inf. McKittrick v. Southwestern Bell Tel. Co., Mo., 92 S.W. 2d 612. As a consequence, and as recognized by respondent, Bell's asserted "statutory right" was but a privilege "to maintain its facilities **somewhere** on the right-of-way in a manner so as to not incommode the public use of the roadway."

The answer to question I, then, is that Bell acquired only a license from the Highway Commission to place its conduit and manholes on subject property when it was a part of the right of way and then under control and supervision of the Commission.

Since Bell had only a license from the Highway Commission to use land under control of the Commission, it follows that Bell could have no right by virtue of such license after the Commission's relinquishment and deed of its right, title, and interest (and control) to plaintiffs. The situation is akin to that in State ex rel. Highway Comm. v. Union Electric Co., Mo., 148 S.W. 2d 503. Union Electric was permitted to place its lines in right of way acquired through condemnation by St. Louis Public Service Company. The right of way was later abandoned and title to it returned to the abutting owners.[1] Thereafter the Highway Commission condemned the abandoned right of way as a right of way for highway purposes. Union Electric claimed an entitlement to the condemnation award contending that it had acquired an easement in the premises by either the original permit to place its lines on the tract or by prescription. The court denied the claim of Union Electric, holding that "Since the railroad company had only an easement interest in the land it had no right to grant an additional easement burden * * * beyond the period of use by the railroad for right of way purposes." 148 S.W. 2d l.c. 506[6]. Similarly, the judgment according Bell rights in plaintiffs' property cannot stand because it may not be said that Bell received a right from the Highway Commission which outlives the use of the property by the Commission as highway right of way. Bell's status in these circumstances is well described in Nelson v. A.T. & T., Mass., 170 N.E. 416, 420: "The defendant at all times must be held to have known that the instrument under which it was permitted to oc-

[1] There is no issue of abutter's rights in this case.

cupy and use the locus was a mere license which was revocable and gave it no estate or interest in the land. It was also bound to know when it entered upon and used the locus that the license was revocable not only at the will of the owner of the property on which it is to be exercised but by his death, by alienation or demise of the land by him, and by whatever would deprive the original owner of the right to do the acts in question or give permission to others to do them."

Respondent cites a number of cases, In re Gillen Place, N.Y., 106 N.E. 2d 897, Arkansas State Highway Comm. v. Arkansas P. & L. Co., Ark., 330 S.W. 2d 77, Owensboro v. Cumberland Telephone Co., 230 U.S. 58, State ex rel. National Subway Co. v. City of St. Louis, Mo., 46 S.W. 981, State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co., Mo., 216 S.W. 763, State v. Iowa Telephone Co., Ia., 154 N.W. 678, on its premise that it acquired a "franchise" right, which, upon acceptance by installation of fixtures, became, in some way, irrevocable and not subject to ouster by the Highway Commission. The difficulty with respondent's argument and citations is that they relate only to whether Bell as a utility can be denied or removed from use of highway right of way by the highway authority. The cases do hold that the utility may not be so denied by the highway commission; but they have nothing to do with the rights of a private property owner as against a utility that would occupy private property without consent of, or compensation to, the private landowner.

Another of Bell's arguments is that to permit plaintiffs' position to prevail is to permit plaintiffs to oust Bell from a highway right of way. Such is not the result of plaintiff's position because their position would require simply that Bell be ordered to move from, or pay for, its occupancy of plaintiffs' private property. If Bell chooses to remain on plaintiffs' property, it must secure plaintiffs' consent or respond in proper damages; if Bell wishes

alternatively to relocate on the highway right of way, it has the authority to do so under Section 392.080, subject to supervision and control of its location by the Highway Commission under Section 227.240. If the latter alternative is chosen by Bell, plaintiffs' damages would be limited to damages for trespass from the commencement of the trespass to time of removal.

The answer to question II, then, is that the consent or license to use the right of way given Bell by the Highway Commission did not extend beyond the Commission's occupancy of the right of way and could give Bell no right in such land after title passed to plaintiffs. As a consequence, Bell became a trespasser upon plaintiffs' land from the date of plaintiff's demand for Bell to move or pay.

Yet another argument by Bell in support of the judgment in its favor is made by emphasizing the words "subject to utilities now in place," in the quitclaim deed and the existence of its manholes on subject property. The argument is that plaintiffs were thus put on inquiry, and by failing to be excited by such language and the existence of a utility in place, they are barred and estopped from recovery.

Since, as previously demonstrated, Bell held no right in subject property beyond its control by the Highway Commission, the emphasized words and the physical presence of manholes, given their fullest import, have no bearing on plaintiffs' rights. The words "utilities in place" and their visual obviousness, if so, did not breath more life into the license than it had at the time the land on which it was exercised was conveyed. As previously recognized, the Highway Commission, by its quitclaim deed, relinquished all its right, title and interest in subject property, including its authority to license or permit Bell to use subject land when it was highway right of way as opposed to private property. In short, plaintiffs are not subject

to an estoppel by a nonexistent right. Langenberg v. City of St. Louis, Mo., 197 S.W. 2d 621, cited by respondent, is not in point because it held only that damage by virtue of a wrongful appropriation was entire at the time of appropriation and the claim for damages for such was not transmitted to a subsequent grantee. Respondent also cites Gibson v. Sharp, Mo. App., 277 S.W. 2d 672, Fuhr v. Dean, 26 Mo. 116, Lewis v. Kaplan, Mo. App., 5 S.W. 2d 699, Wilson v. Owen, Mo., 261 S.W. 2d 19, Missouri Power & Light Co. v. Thomas, Mo., 102 S.W. 2d 564, and Grandstaff v. Bland, Mo. App., 148 S.W. 139, dealing with situations in which licenses were held irrevocable when coupled with certain interests and supported by valuable consideration. They, too, are not in point because Bell paid nothing to the Highway Commission for its license to locate its facility in the highway right of way; and, accordingly, the right acquired by Bell was never anything more than the license previously demonstrated.

Appellants urge that in the event the issues of this appeal are determined in their favor, the court should not only reverse the judgment but should also enter judgment for plaintiffs' damages. This invitation is declined for two reasons: Obviously, the trial court never reached the issue of damages and should be given the opportunity to make findings and enter its judgment on that issue; and, under this decision, there are alternatives yet open to defendant which bear upon the type and amount of damages, if any, to be awarded.

For the reasons indicated, the judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

ANDREW JACKSON HIGGINS
Commissioner

WELBORN, C., Concurs.

Per Curiam: The foregoing opinion by Higgins, C., is adopted as the opinion of the court.

All of the Judges Concur

APPENDIX C

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri
65101

May 8, 1972

Thomas F. Simon
Clerk

Telephone
636-8143

Mr. William C. Sullivan
100 North 12th Blvd.
St. Louis, Missouri 63101

In re: Franke et al. v. Southwestern Bell Telephone Co., No. 55533

Dear Sir:

This is to advise that the Court made the following order in the above-entitled cause on this day:

"Respondent's motion for rehearing or, in the alternative, to transfer to Court en Banc overruled."

Yours very truly

THOMAS F. SIMON
Clerk

cc—C. Kenneth Thies, 8030 Forsyth Blvd., Clayton, Missouri 63105
A. Wimmer Carr, 222 S. Central Ave., Clayton, Mo., 63105

/RS

APPENDIX D

In the
Supreme Court of Missouri
Division 1

Alfred Franke and Theodore R. P. Martin,
Plaintiffs-Appellants,
vs.
Southwestern Bell Telephone Company,
Defendant-Respondent.
} No. 55,533.

Appeal from the Circuit Court of the County of St. Louis
Division 1
Honorable George E. Schaaf, Judge

STATEMENT, BRIEF AND ARGUMENT
Of Defendant-Respondent, Southwestern Bell Telephone Company

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Excerpts From the Brief

[16] This semantic problem has led to frequent confusion by lawyers and courts in cases such as this where the **franchise** inheres and emanates from the state alone. The real property right in question has been variously described as a franchise, an incorporal hereditament in the nature of an easement, a right-of-way, an irrevocable right coupled with an interest, and, a license coupled with an interest. **In re Gillen Place, City of New York**, 106 N. E. 2d 897 (1952); **Arkansas State Highway Commission v. Arkansas Power and Light Company**, 330 S. W. 2d 77 (1960); 36 **Am. Jur.** (2) 723.

Once the franchise right is accepted, it becomes an irrevocable real property right, subject only to such limitations as are expressly reserved. One of the leading cases so holding is **Owensboro v. Cumberland Tel & Tel.**, 230 U. S. 58, 57 Law Ed. 1389 (1913). In that case the Supreme Court of the United States reviewed a decree enjoining the enforcement of a municipal ordinance attempting to repeal a telephone company's franchise originally granted by ordinance.

The Court in determining the telephone company's rights under the original franchise grant held (230 U. S., l. c. 64, 65):

> 1. **That the right conferred by the ordinance involved is something more than a mere license is plain.** A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless . . . expenditures contemplated by the licensor when the license was given have been made . . .
>
> That the grant in the present case was not a mere license is evident from the fact that it was upon its

[17] face neither personal nor for a temporary purpose. The right conferred came from the state through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law, and it was subject to all of the police power of the city.

That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases . . . .

2. The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, **is a grant of a property right in perpetuity**, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant.

* * * * * * *

If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. **If the grant be accepted** and the contemplated expenditure made, **the right cannot be destroyed** by legislative enactment, or city ordinance based upon legislative power, **without violating the**

[18] prohibitions placed in the Constitution for the protection of property rights.

When discussing the city of Owensboro's attempt to revoke defendant telephone company's franchise right to remain and operate within the city streets the Court held (230 U.S., l. c. 72):

> It (city ordinance requiring defendant to remove its facilities from city streets and alleys) is a plain attempt to destroy the **vested property right** under which a great plant had been installed. . . . **When that grant was accepted and acted upon it became a contract between the city and the telephone company which could not be revoked or repealed unless the power to revoke or repeal was clearly and unmistakably reserved** (emphasis added).

In **State ex rel. National Subway Co. v. City of St. Louis, et al.**, Mo. Sup., 46 S. W. 981 (1898), Justice Sherwood, in his concurring opinion, adopts the same theory of irrevocable property right in construing the Subway Company's interest under a city franchise ordinance; l. c. 993:

> . . . 'Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, **became an irrevocable contract; and the city is powerless to set it aside, or to interpolate new and more onerous considerations therein.**
>
> * * *
>
> The ducts mentioned perform the same service as poles erected on the surface of the highways. To render them accessible, and to give electrical accomodations to buildings along the route of the tunnel or conduit, it is necessary to construct manholes, and to unite the buildings with it by means of lateral ducts from them (Emphasis added).

[19] In **Hagerman v. St. Louis & E. St. L. Electric Railway Co.**, Mo. Sup., 216 S. W. 763 (1919), affirmed Sup. Ct. U. S., 256 U. S. 314, 41 Sup. Ct. 488, the Missouri Supreme Court held that a franchise becomes vested when accepted.

A similar ruling was handed down by the Supreme Court of Iowa in **State v. Iowa Telephone Co.**, 154 N. W. 678 (1915), l. c. 681, 682:

> The original grant by the Legislature being unlimited as to time, **gave to whoever might accept the grant a special franchise in perpetuity,** subject only to a proper exercise of the police power, and to any expressly reserved power (Emphasis added).
>
> * * * * * * * *
>
> "That the Legislature granted a special **franchise, rather than a revocable license,** should, we think, be conceded" (Emphasis added).

These cases follow the general rule set out in 36 **Am. Jur.** (2) 777:

> "The general rule is that a franchise right is not revocable after contractual rights thereunder have become vested in grantee."

In **In Re Gillen Place, City of New York,** 106 N. E. 2d 897 (1952), where the city determined to eliminate "Gillen Place" as a street and right of public passage, the court held that the utilities within and under said street were entitled to compensation for cost of removing their facilities. The Court ruled, l. c. 900, 901:

> 7. In thus defining claimant's subsurface structures, consisting of mains and conduits, and the franchises under which they were laid, **as real property, for which compensation must be made if affected or** [20] **damaged by the street closing, the statute merely follows the common law.** In this State, it is settled that

both the tangible property and the intangible right together **constitute the estate created by special franchise,** New York Telephone Co. v. State of New York, 169 App. Div. 310, 318, 321, 154 N. Y. S. 1059, 1065, 1067, affirmed 218 N. Y. 738, 113 N. E. 1061; People ex rel. Barron v. Knapp, 208 App. Div. 127, 130, 203 N. Y. S. 76, 78, affirmed 239 N. Y. 581, 147 N. E. 204; People ex rel. Metropolitan St. Ry. Co. v. State Board of Tax Com'rs, 174 N. Y. 417, 441, 67 N. E. 69, 74, 63 L. R. A. 884; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546. **Such estate is an incorporeal hereditament, in the nature of an easement in the street wherein the installation is made,** Levy v. McClellan, 196 N. Y. 178, 193-194, 89 N. E. 569, 571; Ghee v. Northern Union Gas Co., supra; United States v. 25.4 Acres of Land, D. C., 65 F. Supp. 333, Id., D. C., 71 F. Supp. 248, reversed on other grounds sub nom. United States v. Brooklyn Union Gas Co., 2 Cir., 168 F. 2d 391. **This incorporeal hereditament is of course an interest in land constituting real property.** Real Property Law, McK. Consol. Laws, c. 50, Par. 2; General Construction Law, McK. Consol. Laws, c. 22, Par. 40. We recognized these principles in Ghee v. Northern Union Gas Co., supra, where we pointed out, 158 N. Y. at page 513, N. E. at page 696, that the special franchise granted by the municipality vests in the recipient "**a perpetual and indefeasible interest in the land constituting the street,**" and in Levy v. McClellan, supra, where we said 196 N. Y. at pages 193-194, 89 N. E. at page 571:

'In the nature of incorporeal hereditaments at **common law franchises partook of the nature of realty, and these special franchises are inseparable from real**
[21] **property in their enjoyment.** They fall necessarily into that one of the two general divisions of property made by the statute which is described as real estate

(referring to what is now Real Property Law, Par. 2) * * *. **These franchises could never be classified as personal property'** (Emphasis added).

In **Arkansas State Highway Com'n v. Arkansas P. & L. Co.**, 330 S. W. 2d 77 (1960), the Highway Commission was required to pay for the relocation of a utility's facilities where the facilities were ordered to be removed entirely from the right of way, even though plaintiff Highway Commission had power to order relocation at some other place in the highway right-of-way. The Court adopted the "irrevocable property by whatever name used" theory at l. c. 79, 81:

> The Court said in Natural Gas & Fuel Corp. v. Norphlet Gas & Water Co., 173 Ark. 174, 294 S. W. 52, 55: 'Again in City of Louisville v. Cumberland Telephone & Telegraph Co., 224 U. S. 649, 32 S. Ct. 572, 56 L. Ed. 934, it was held that **the right to use the streets in a city for the purpose of a public utility 'has been called by various names—incorporeal hereditament, an interest in land, an easement, a right-of-way but, howsoever designated, it is property.'** This principle has been recognized and applied by this court in Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 148 Ark. 260, 230 S. W. 897.
>
> * * * * * * * *
>
> Under the terms of this contract the Power Company obligated itself to spend thousands of dollars in placing the poles and wires in the city. There is no contention that the Company has not fulfilled its obligation to the letter. In fact, the Company would be liable for breach of contract if it had failed to comply
> [22] with the conditions of the agreement. In these circumstances **could the city officials change their minds the day after the Power Company had completed the installation of its equipment and in the exercise of**

the police power inform the Company that it must get its equipment out of the city? The answer is 'No' (Emphasis added).

Plaintiffs entire case rests on the fact that they acquired the property in question in 1963 by a quit-claim deed from the Highway Commission which conveyed the property ". . . subject to utilities now in place." They have failed to meet their burden of establishing any title or property right superior to defendant's irrevocable property right to maintain its facilities as placed in 1958 on said property. Since they failed to meet this burden, the trial court properly entered judgment for the defendant.

* * * * * * * *

APPENDIX E

In the
Supreme Court of Missouri
Division 1

Alfred Franke and Theodore R. P. Martin,
Plaintiffs-Appellants,
v.
Southwestern Bell Telephone Company,
Defendant-Respondent.
No. 55,533

MOTION FOR REHEARING AND ALTERNATIVE MOTION FOR TRANSFER TO THE SUPREME COURT EN BANC

Comes now Respondent, Southwestern Bell Telephone Company, and respectfully moves the Court to set aside its decision and opinion herein, and grant a rehearing of this cause, or, in the alternative, to transfer this cause to the Supreme Court en banc on the following grounds:

1. THIS IS A CASE OF FIRST IMPRESSION IN MISSOURI, AND IS A MATTER OF GREAT GENERAL INTEREST AND IMPORTANCE WARRANTING TRANSFER OF THE CAUSE TO THE SUPREME COURT EN BANC.

The holding and opinion of the Court affects not only Respondent, but affects most public utilities across the State, and seriously impairs franchise rights of public utilities in the State of Missouri to locate and maintain their facilities in public road right-of-way, purporting to transform these franchise rights into bare licenses. These

public utilities, operating under their respective franchises, have invested billions of dollars in the facilities used to serve the people of this State, with a large part of these facilities located on public road right-of-way. The decisions to so invest in facilities located on public road right-of-way were partially based on the premise that the utilities had a legally protected franchise right of uninterrupted use of the facilities as placed, subject only to the superior right of the State to require relocation to another site within the right-of-way when specific public interests required the relocation, and even then, the public utility was entitled to notice, hearing and judicial review as to whether that public interest required the relocation. The holding and decision of the Court in this case seriously impairs these franchise rights, discourages the use of public right-of-way by these public utilities, and requires these public utilities to acquire private right-of-way to insure that they may continue to use the facilities as and where they are constructed. This becomes a matter of great public interest and importance because the substantial additional expenditures, which will be required, will become a part of the utilities' investment upon which the rates paid by the people in Missouri are based. In addition, the holding and opinion of the Court will result in a proliferation of legal proceedings and condemnation actions necessary to secure proper and protected utility right-of-way, and will burden real properties in this State with numerous additional servitudes and encumbrances.

2. THE HOLDING AND OPINION OF THE COURT ERRONEOUSLY ASSERTS THAT RESPONDENT'S REAL PROPERTY INTEREST TO MAINTAIN ITS UNDERGROUND UTILITY FACILITIES IN PLACE ARISES UNDER AND BY VIRTUE OF § 227.240, RS Mo. 1969, AS A LICENSE GRANTED BY THE STATE HIGHWAY COMMISSION, WHEREAS RESPONDENT'S REAL PROPERTY INTEREST IN MAINTAIN-

ING ITS UNDERGROUND UTILITY FACILITIES IS IN FACT A FRANCHISE GRANTED BY THE GENERAL ASSEMBLY ON BEHALF OF THE STATE OF MISSOURI TO RESPONDENT (AND OTHER UTILITIES SIMILARLY SITUATED) UNDER AND BY VIRTUE OF THE PROVISIONS OF § 392.080, RSMo. 1969:

> MAY CONSTRUCT LINES ON PUBLIC ROADS—CONSENT OF CITY REQUIRED. Companies organized under the provisions of § 392.010 to 392.170, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters; provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof.

This statutory grant by the General Assembly was held to be of general public benefit and therefore constitutional by the Supreme Court en banc in **State ex rel. McKittrick v. Southwestern Bell Telephone Co.**, 92 SW2d 612, 614:

> The respondent is a public utility engaged in furnishing telephone service to the general public. The General Assembly no doubt considered that the benefit to the general public arising from the promotion of the extension of such service justified the granting of the privilege of the use of the highways.

In its decision, this Court, en banc, quoted and relied heavily upon the decision of the Supreme Court of the United States in a case almost directly in point, **State of Georgia v. Trustees of Cincinnati So. Ry.**, 248 U.S. 26.

3. THE HOLDING AND OPINION OF THIS COURT IS CONTRARY TO, AND THUS IGNORES, DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OF THIS COURT EN BANC, DEPRIVES RESPONDENT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND IS IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF MISSOURI, IN ITS FINDING THAT RESPONDENT HAD ONLY A BARE LICENSE TO MAINTAIN ITS UNDERGROUND UTILITY FACILITIES WHERE PLACED AND IN USE FOR FOURTEEN (14) YEARS, AND IN FAILING TO RECOGNIZE THAT RESPONDENT HAD A VESTED REAL PROPERTY INTEREST IN THE NATURE OF AN EASEMENT, OR, AT THE VERY MINIMUM, A NON-REVOKABLE LICENSE COUPLED WITH AN INTEREST. THESE RAISE FEDERAL QUESTIONS WHICH REQUIRE A TRANSFER TO THE COURT EN BANC, PURSUANT TO ARTICLE V, § 9, OF THE CONSTITUTION OF MISSOURI.

4. THE HOLDING AND OPINION OF THE COURT INTERPRETS THE LAW IN SUCH A WAY AS TO VOID THE SALE OF THE PROPERTY IN ISSUE TO APPELLANTS.

Under the provisions of § 227.240, RSMo. 1969, as recognized by this Court in its opinion and holding as well as in the cases cited by it, the State Highway Commission could not have ordered Respondent to completely remove its facilities from State Highway right-of-way, and could not have even ordered relocation of those facilities within the right-of-way without proper written notice and hearing. Even if the Highway Commission could have ordered Respondent to relocate its facilities off the right-of-way, the Highway Commission did not attempt to do so, for good reason, but rather, attempted to persevere, through

the wording in the deed by which it conveyed the property to Appellants, Respondent's rights to continue use and possession of its public utility facilities as located.

Under the provisions of Chapter 536, the Administrative Procedure and Review Act, the deprivation of Respondent's right (or privilege) to use the road right-of-way is a "contested case" and requires written notice and hearing. If Respondent does not have a real property interest in the nature of an easement which is protected upon the sale of excess property by the State (through the Highway Commission), then the sale itself was invalid because the purported sale of this excess property has effectively removed Respondent's facilities from the State Highway right-of-way without notice to Respondent and without giving Respondent an opportunity to be heard as required by said Chapters 227 and 536, RSMo. 1969. The result of this Court's interpretation is to place the State and Highway Commission in the position of having deprived Respondent of its due process of law in violation of specific statutory prohibitions, and of having acted beyond its authority, causing the purported sale to be void, even though the State and Highway Commission clearly did not intend to do so, and explicitly recognized and attempted to preserve Respondent's rights. The Court should not so interpret the law.

5. THE HOLDING AND OPINION OF THIS COURT MISINTERPRETED MATERIAL FACTS, TO-WIT (a) THE PROPERTY IN QUESTION WAS OWNED BY THE STATE, NOT THE HIGHWAY COMMISSION; (b) THE SALE OF THE PROPERTY WAS MADE BY THE STATE (ACTING THROUGH ITS AGENT), AND NOT BY THE HIGHWAY COMMISSION; (c) THE STATE COULD CREATE PROPERTY RIGHTS IN FAVOR OF SOUTHWESTERN BELL TELEPHONE COMPANY BY SPECIFIC RESERVATION

AND/OR GRANT IN ITS QUIT CLAIM DEED (EVEN IF NONE HAD EXISTED PRIOR TO THE PROPERTY TRANSFER); THE STATE **DID** CREATE AND/OR PRESERVE PROPERTY RIGHTS IN ITS QUIT CLAIM DEED BY SPECIFIC RESERVATION AND/OR GRANT, THUS CLEARLY RECOGNIZING THE LEGISLATIVE INTENT AND GREAT PUBLIC BENEFITS OF UTILITY USE OF PUBLIC RIGHT-OF-WAY; AND, (d) THE RESPONDENT'S RIGHTS BY REASON OF THE STATE'S LIMITED TRANSFER UNDER QUIT CLAIM DEED CANNOT BE EXTINGUISHED WITHOUT DUE PROCESS OF LAW.

WHEREFORE, Southwestern Bell Telephone Company respectfully moves the Court to set aside its decision and opinion herein, and grant a rehearing of this cause, or in the alternative, to transfer this cause to the Supreme Court en banc.

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Attorneys for Defendant-Respondent,
Southwestern Bell Telephone Company
By /s/ WM. C. SULLIVAN

Proof of Service

The undersigned certifies that a complete copy of this Motion for Rehearing and Alternative Motion for Transfer to the Supreme Court En Banc, was served upon A.

Wimmer Carr, Attorney for Plaintiffs-Appellants, 222 S. Central Ave., Clayton, Mo. 63105, with first-class postage fully prepaid, and by depositing same envelope in a U. S. Post Office Mail Box in St. Louis, Missouri, on the 21st day of April, A.D., 1972.

/s/ WM. C. SULLIVAN

APPENDIX F

In the
Supreme Court of Missouri
Division 1

Alfred Franke and Theodore R. P. Martin, Plaintiffs-Appellants, vs. Southwestern Bell Telephone Company, Defendant-Respondent.	No. 55,533

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING AND ALTERNATIVE MOTION FOR TRANSFER TO THE SUPREME COURT EN BANC

1. THIS IS A CASE OF FIRST IMPRESSION IN MISSOURI, AND IS A MATTER OF GREAT GENERAL INTEREST AND IMPORTANCE WARRANTING TRANSFER OF THE CAUSE TO THE SUPREME COURT EN BANC.

The opinion and holding of the Court subjects every utility in the State of Missouri to the constant peril and even caprice of the Highway Commission. If by that decision, as here, the Highway Commission has the right to order a relocation of Southwestern Bell's facilities, at unusual expense, and then by a sale of a portion of the highway, it can either intentionally or unintentionally void all rights of utilities located on that property, such a determination would create state-wide confusion appli-

cable to all utilities and would constitute an unbelievable inequity in literally thousands of situations such as this which will arise or indeed potentially exist at this moment.

Since the issue of a utility's right to remain in place on property sold as "excess" right-of-way by the State is one of first impression in this State, and because the effect of the determination of the utility's right will have a significant impact on utility rates of every user, this decision is clearly of major interest and importance to the public.

The opinion and holding of the Court would further effectively subvert the legislative intent to orderly provide public utility easement without cost to the public (rate payers). If the intent and purpose of § 392.080 is proper, and it has so been held in **State ex rel. McKittrick v. Southwestern Bell Telephone Co.**, 92 SW 2d 612, then there is sufficient general interest and importance to grant this motion.

2. THE HOLDING AND OPINION OF THE COURT ERRONEOUSLY ASSERTS THAT RESPONDENT'S REAL PROPERTY INTEREST TO MAINTAIN ITS UNDERGROUND UTILITY FACILITIES IN PLACE ARISES UNDER AND BY VIRTUE OF § 227.240, R.S. MO. 1969, AS A LICENSE GRANTED BY THE STATE HIGHWAY COMMISSION, WHEREAS RESPONDENT'S REAL PROPERTY INTEREST IN MAINTAINING ITS UNDERGROUND UTILITY FACILITIES IS IN FACT A FRANCHISE GRANTED BY THE GENERAL ASSEMBLY ON BEHALF OF THE STATE OF MISSOURI TO RESPONDENT (AND OTHER UTILITIES SIMILARLY SITUATED) UNDER AND BY VIRTUE OF THE PROVISIONS OF § 392.080, R.S.MO. 1969:

> MAY CONSTRUCT LINES ON PUBLIC ROADS—CONSENT OF CITY REQUIRED. COMPANIES

ORGANIZED UNDER THE PROVISIONS OF § 392.010 TO 392.170, FOR THE PURPOSE OF CONSTRUCTING AND MAINTAINING TELEPHONE OR MAGNETIC TELEGRAPH LINES ARE AUTHORIZED TO SET THEIR POLES, PIERS, ABUTMENTS, WIRES AND OTHER FIXTURES ALONG, ACROSS OR UNDER ANY OF THE PUBLIC ROADS, STREETS AND WATERS OF THIS STATE, IN SUCH MANNER AS NOT TO INCOMMODE THE PUBLIC IN THE USE OF SUCH ROADS, STREETS AND WATERS; PROVIDED, ANY TELEGRAPH OR TELEPHONE COMPANY DESIRING TO PLACE THEIR WIRES, POLES AND OTHER FIXTURES IN ANY CITY, THEY SHALL FIRST OBTAIN CONSENT FROM SAID CITY THROUGH THE MUNICIPAL AUTHORITIES THEREOF.

Respondent does not allege it received its property right by virtue of § 227.240 R.S.Mo., or the permit issued thereunder by the Highway Commission. Southwestern Bell Telephone Company's franchise rights were granted by the State based upon § 392.808, and in the instant case (because no city or municipal authority is involved) are subject only to the limited supervisory powers of the Highway Commission. It is clear that Respondent's rights were granted by the General Assembly under § 392.080 and were properly intended as a grant to a private corporation for the public benefit, as was so held by this Court in the **McKittrick v. Southwestern Bell Telephone Co.** case. It is also clear that the Highway Commission's jurisdiction is limited by both § 392.080 and by 227.240. The interpretation of § 392.080 on p. 6 of the opinion improperly interprets and then mixes the provisions of § 392.-080 and § 227.240 and concludes that the "consent" required under § 392.080 conditions the legislative franchise grant to the total control and supervision of the Highway

Commission, even though § 227.240 specifically refers to the control and supervision "**insofar as the public travel and traffic is concerned,**" and severely limits the Commission's power so "**that the effect of any change ordered by the Commission shall not be to remove all or any part of such lines, poles, conduits, pipe lines or tramways from the right-of-way of the highway**" (emphasis added).

Clearly the grant to use the road right-of-way was from the State under § 392.080, conditioned only on municipal authorization in cities (not at issue here) and subject only to the specific restriction that the utility not incommode the public use. Neither the condition nor restriction is applicable to the instant case.

3. THE HOLDING AND OPINION OF THIS COURT IS CONTRARY TO, AND THUS IGNORES, DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OF THIS COURT EN BANC, DEPRIVES RESPONDENT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND IS IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF MISSOURI, IN ITS FINDING THAT RESPONDENT HAD ONLY A BARE LICENSE TO MAINTAIN ITS UNDERGROUND UTILITY FACILITIES WHERE PLACED AND IN USE FOR FOURTEEN (14) YEARS, AND IN FAILING TO RECOGNIZE THAT RESPONDENT HAD A VESTED REAL PROPERTY INTEREST IN THE NATURE OF AN EASEMENT, OR, AT THE VERY MINIMUM, A NONREVOKABLE LICENSE COUPLED WITH AN INTEREST. THESE RAISE FEDERAL QUESTIONS WHICH REQUIRE A TRANSFER TO THE COURT EN BANC, PURSUANT TO ARTICLE V, § 9, OF THE CONSTITUTION OF MISSOURI.

The opinion and holding of the Court acknowledges that Respondent has cited numerous cases in its brief, in-

cluding **Owensboro v. Cumberland Telephone Co.**, 230 U.S. 58, and **Hagerman v. St. Louis and East St. Louis Electric Ry. Co.**, Mo., 216 SW 763, which support the position that a legislative grant and its acceptance and use of streets, etc., by a public utility creates a property right in the nature of a franchise. In the **Owensboro** case, the United States Supreme Court specifically held that the franchise right is not a mere license, and further holds that the granting of the right to use city streets is a grant of a property right in perpetuity, unless limited by the grant itself. In that case the court said: "Granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this Court to need more than a reference to some of the latter cases (then citing 3 recent decisions so holding)". Numerous other state and federal decisions also support that holding; that holding has not been overruled or modified subsequently.

In that case, the Court further held that the Cumberland Telephone Company had acquired a "vested property right" in the nature of contract which was protected by the United States Constitution.

This Court's opinion, p. 8, admits that the Highway Commission is bound by these Supreme Court decisions:

> "The difficulty with Respondent's argument and citations is that they relate only to whether Bell as a utility can be denied or removed from use of highway right-of-way **by the highway authority. The cases do hold that the utility may not be so denied by the Highway Commission**; but that they have nothing to do with the rights of a private property owner as against a utility" (emphasis added).

That argument is specious: The General Assembly granted Respondent a constitutional franchise right under

§ 392.080; the Supreme Courts of both the United States and Missouri have held that the granted franchise right is a vested property right and not a mere license; the Highway Commission has only limited supervisory powers over the grant insofar as the public use of the highway is incommoded; the State specifically recognized and preserved the right of the Respondent by deed; and the Appellants were specifically put on notice by the deed restriction. How could Southwestern Bell Telephone Company have a **valid, vested, property right** (which was specifically preserved for it in the quit claim deed of conveyance) as against the State (and Highway Commission) and be deprived of that vested property right by a forewarned third party purchaser, without even notice or a hearing afforded to the Respondent? Such is clearly an attempt to impair Southwestern Bell Telephone Company's contractural and property rights as well as to violate its rights to due process of law.

4. THE HOLDING AND OPINION OF THE COURT INTERPRETS THE LAW IN SUCH A WAY AS TO VOID THE SALE OF THE PROPERTY IN ISSUE TO APPELLANTS.

The effect of the Court's holding would be to allow the Highway Commission to cause a utility to relocate or completely remove its facilities without cause or public incommodation, although it is prohibited from directly doing that by statute; and further, it would allow that indirect action without notice or hearing afforded the utility effected, and even when clearly not intended by the conveying authority. Such a result is abrogation.

To argue that Southwestern Bell still has the opportunity to go back to the Highway Commission and seek a new location on the right-of-way is, of course, specious. The property right of Respondent to remain in peaceful possession as located, insofar as its utility's facilities do

not incommode the public use of the roadway has been violated.

The decision announces that the Highway Commission can (and does, whether it wants to or not) do indirectly (namely the expulsion of utilities from the rights-of-way of the State), which it cannot do directly. The Supreme Court of Missouri en banc has ruled in **State ex rel. Highway Commission v. Weinstein**, 322 S.W. 2d 778, that: "a utility has the right to be on the right-of-way somewhere". This decision requires the Highway Commission to void rights thus accorded by merely "selling out" the area. The same area upon which the same Highway Commission only a short time before specified and directed the utility to so locate. That could not have been the legislative intent in § 392.080 or § 227.290. If the placement and use of utility facilities on State property is a valid purpose during the ownership of property by the State, as it was held to be in **McKittrick v. Southwestern Bell Telephone Company**, it is not consistent to interpret § 227.290 as cutting off that public purpose and intent and private property rights when excess right-of-way is sold; especially when the State specifically protected those interests and rights in the deed of conveyance. These statutes should be interpreted in light of each other and accordant with the expressed clear intent and action of the grantors.

5. THE HOLDING AND OPINION OF THIS COURT MISINTERPRETED MATERIAL FACTS, TO-WIT: (a) THE PROPERTY IN QUESTION WAS OWNED BY THE STATE, NOT THE HIGHWAY COMMISSION; (b) THE SALE OF THE PROPERTY WAS MADE BY THE STATE (ACTING THROUGH ITS AGENT), AND NOT BY THE HIGHWAY COMMISSION; (c) THE STATE COULD CREATE PROPERTY RIGHTS IN FAVOR OF SOUTHWESTERN BELL TELEPHONE COMPANY BY

SPECIFIC RESERVATION AND/OR GRANT IN ITS QUIT CLAIM DEED (EVEN IF NONE HAD EXISTED PRIOR TO THE PROPERTY TRANSFER); THE STATE **DID** CREATE AND/OR PRESERVE PROPERTY RIGHTS IN ITS QUIT CLAIM DEED BY SPECIFIC RESERVATION AND/OR GRANT, THUS CLEARLY RECOGNIZING THE LEGISLATIVE INTENT AND GREAT PUBLIC BENEFITS OF UTILITY USE OF PUBLIC RIGHT-OF-WAY; AND, (d) THE RESPONDENT'S RIGHTS BY REASON OF THE STATE'S LIMITED TRANSFER UNDER QUIT CLAIM DEED CANNOT BE EXTINGUISHED WITHOUT DUE PROCESS OF LAW.

This Court's holding and opinion addresses itself to the issue of what the Highway Commission could or could not do; it does not consider what the State actually did do.

Clearly title to the property in question was taken by the State; and, therefore, conveyed by the State. The State through the General Assembly had granted a franchise right to the Respondent under § 392.080; it recognized that right, the legislative intent and the public purpose of the grant, and its obligation under statute to protect the public and Respondent's interest. By specific reservation in the deed of conveyance it made the transfer "subject [to the rights of public utilities to remain] in place". Clearly the State intended to insure some right to the public utilities, or it would not have specifically included the additional language, "subject to utilities in place". The deed itself created a property right even if one had not been created by statutory franchise. Certainly the State (acting through its authorized statutory agent) had the power and right to preserve public rights for public use.

Even if the State could have excluded Respondent from the right-of-way, it obviously did not intend such a result,

and for good reason. The legislative intent and reasoning underlying § 392.080, this Court's interpretation of the statutory grant in **McKittrick v. Southwestern Bell Telephone Company**, the public interest and benefit from the franchise, the private right of due process of law, and the clear and plain meaning of the deed restriction "subject to utilities in place" all require reconsideration of the issues and decision. Certainly the overall purpose and effect of these should be reviewed in *pari materia.*

Respectfully submitted

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By /s/ WM. C. SULLIVAN

PROOF OF SERVICE

The undersigned certifies that a complete copy of this Suggestions in Support of Motion for Rehearing and Alternative Motion for Transfer to the Supreme Court En Banc, was served upon A. Wimmer Carr, Attorney for Plaintiffs-Appellants, 222 S. Central Ave., Clayton, Missouri 63105, with first class postage fully prepaid, and by depositing same envelope in a U.S. Post Office Mail Box in St. Louis, Missouri on the 21 day of April, A.D., 1972.

/s/ WM. C. SULLIVAN

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

ALFRED FRANKE and THEODORE R. P. MARTIN,
Respondents.

SUGGESTIONS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REASON FOR DENYING THE WRIT OF CERTIORARI

I

The Federal Question Was Not Raised in a Proper and Timely Manner.

Petitioner has failed to timely raise the Federal question in the trial of this case in St. Louis County Circuit Court or in the appeal to the Missouri Supreme Court.

The second basis Petitioner argues as grounds for granting of this Certiorari is its claim that the decision of the Missouri Supreme Court could not have been anticipated.

In **Missouri ex rel. Missouri Insurance Company v. Gehner**, 281 U.S. 313 (1930), cited by Petitioners, the Court held that the ruling must unexpectedly give rise to the Federal question that the party seeking review had no previous opportunity to assert and could not have anticipated.

In reversing the Trial Court verdict, the Missouri Supreme Court granted Respondents the relief as prayed in their petition and which they had sought throughout the trial. It is difficult to see how Petitioner could not have expected that one possible result of the litigation would be a judgment in favor of Respondents based upon the prayer in their petition including the following language:

> "that Defendant does not have any easement, right, title, estate, interest or license whatever in or to said real estate or any part or parcel thereof, and that Defendant be forever enjoined and barred from claiming or asserting any right, title, estate, easement or interest in or to the land of Plaintiffs."

There is no difference in Southwestern Bell Telephone's position relative to the alleged constitutional issue prior to the rendition of the Missouri Supreme Court judgment than after it, except that it had lost the case. It was on notice from the inception of the litigation that its rights to be in the property were subject to being cut off.

Petitioner argues that the Missouri Supreme Court has disregarded its prior position in **State ex rel. Highway Commission v. Weinstein**, 322 SW2nd 788 (1959) which cited and followed **State ex rel. State Highway Commission v. Union Electric Company of Missouri**, 142 SW2nd

1099 (1940). This claim has no basis. In the **Weinstein** case the Court held the utility had only a license to be in the highway right of way and could be ordered by the Highway Commission to move its line from one point in the right of way to another. The Missouri Supreme Court decision in the case at bar is entirely consistent with that ruling and in its opinion specifically followed **Weinstein** by holding that Southwestern Bell Telephone Company had a license to locate somewhere in the highway right of way, as long as it was right of way, but went on to rule that once the property was no longer right of way Petitioner had no legal interest in the property. The Court did hold, however, that Petitioner can maintain its lines through Respondents' property by condemning an easement and paying for it. Petitioner's entire argument is based upon the false premise that the subject property is still highway right of way. The facts of the case clearly show that the subject property is no longer highway right of way after its sale as excess property to the Respondents. Petitioner's legal argument in support of the issuance of the Writ of Certiorari must fail when the facts are distinguishable from the cases upon which it relies.

II

The Missouri Supreme Court's Decision Is Based On Adequate and Independent State Grounds.

The holding of the Missouri Supreme Court in favor of Respondents was based on the Missouri case law as stated in **State ex rel. Highway Commission v. Union Electric Company**, 148 SW2nd 503, and **Weinstein**, supra. As we have argued above under the facts of this case, the Missouri law has been properly applied. The Union Electric case, which is a different one from the case cited in **Wein-**

stein, held in a subsequent condemnation of an abandoned right of way, Union Electric, which had its line in the abandoned right of way under grant from the previous right of way holder, had no property interest and was not entitled to any part of the subsequent condemnation award. The **Weinstein** case as stated above holds that the utility has a right to be in the right of way as long as it is right of way. These cases were used to construe the statutes of Missouri to determine Petitioner's interest in the subject property after it ceased to be highway right of way.

This construction, based upon these two cases, is in no way inconsistent with **Owensboro**. The facts in **Owensboro** only delineate the rights of a utility in public right of way when it is being used as public right of way. The Missouri Supreme Court did not fail to recognize the validity of the **Owensboro** decision by its language, but did distinguish the application of **Owensboro** on the facts of the case at bar.

The Missouri Supreme Court took no right from Petitioner in a highway right of way, but did hold that when the property is no longer highway right of way and becomes private property by means of an excess property sale the utility has to pay for the use of the property. (Appendix B, Page A16 1st paragraph of Petitioner's Brief.)

CONCLUSION

For the foregoing reasons Respondent respectfully submits the Writ of Certiorari prayed by Petitioner should be denied.

Respectfully submitted

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